UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 97-087-T

DONALD DESIR

MEMORANDUM AND ORDER

ERNEST C. TORRES, Chief Judge.

Donald Desir has moved, pursuant to Fed. R. Crim. P. 33, for a new trial with respect to his conviction for conspiring to and attempting to possess cocaine with intent to distribute it in violation of 21 U.S.C. §§ 841(a)(1) and 846. Desir's motion is based on a claim of newly discovered evidence.

Because I find that the proffered evidence is either not "newly discovered," incredible, and/or insufficient to warrant a new trial, the motion is denied.

Background

On October 30, 1997, Desir was arrested on charges of conspiring to possess cocaine with intent to distribute it and for attempting to possess cocaine with the intent to distribute it. He was represented by David Cicilline, a very able defense attorney with considerable experience defending criminal cases in the federal courts.

After a bail hearing, Magistrate Judge Lovegreen ordered that Desir be detained, pending trial. That order was appealed to this

Court and, after a hearing was conducted on December 10, 1997, the appeal was denied. Although, as counsel for Desir points out, the transcript of that hearing does not expressly state whether Desir was present, it is this Court's well-established practice to insure that the defendant is present for such hearings. Moreover, during the September 29, 2000 hearing on Desir's motion for a new trial, Desir acknowledged that he was present at the December hearing.

On January 6, 1998, a jury was empaneled before Magistrate Judge Lovegreen. Neither Desir nor his counsel registered any objection to the fact that a magistrate judge conducted the empanelment.

One of the alternate jurors selected was Bruno Sukys, who identified himself as a Social Services Director at the International Institute of Rhode Island, an organization that assists immigrants and other non-citizens in various ways, including advising them with respect to immigration problems. During the empanelment process, the jurors were asked whether any of them knew Desir or his co-defendant, and Sukys gave no indication that he did. One week later, Desir's trial began. When one of the regular jurors was excused, Sukys replaced that individual. Eventually, the jury returned guilty verdicts with respect to both offenses charged, and, on June 5, 1998, this Court sentenced Desir to a term of 240 months incarceration.

In July of 1999, more than a year after sentencing, Desir,

acting *pro se*, filed the instant motion for a new trial based on what he claims is newly discovered evidence. After concluding that an evidentiary hearing would be required and recognizing that Desir should be represented by counsel, this Court sent Desir a financial affidavit in order to determine whether he qualified for court-appointed counsel under the Criminal Justice Act. Desir never filed the affidavit, but elected, instead, to retain John P. Larochelle as his counsel.

Through his counsel, Desir cites two grounds for his motion:

1. That he was deprived of his right to a fair and impartial jury because Sukys knew him, was aware that Desir previously had been convicted of another drug offense, and had made up his mind to vote for conviction even before any evidence was presented.
2. That he was deprived of his right to have jury empanelment conducted by an Article III judge rather than a magistrate judge.

On September 29 and October 2, 2000, this Court conducted an evidentiary hearing to consider Desir's claims. For the sake of clarity, my findings with respect to the relevant facts are incorporated in the discussion of Desir's arguments. These findings are made after observing the demeanor of the witnesses, evaluating their credibility, carefully weighing their testimony, and reviewing the record.

Standard of Review

In order to prevail on a motion for a new trial based on a claim of newly discovered evidence, a defendant must establish that:

1. the evidence in question was unknown or unavailable to the defendant at the time of trial;
2. the failure to learn of the evidence was not attributable to any lack of due diligence on the part of the defendant or his counsel;
3. the evidence is material and not merely cumulative or impeaching; and,
4. the evidence is likely to result in an acquittal.

United States v. Tibolt, 72 F.3d 965, 971 (1st Cir. 1995); United States v. DeLuca, 945 F. Supp. 409, 412 (D.R.I. 1993).

Discussion

I. Sukys' Impartiality

Desir asserts that, because Sukys previously had assisted him with respect to some unspecified immigration matters, Sukys must have known who Desir was, Sukys must have been aware that Desir had a prior drug conviction, and such knowledge predisposed Sukys to vote for a conviction.

The fact that a juror knows something adverse about a defendant may be grounds for a new trial if the defendant was unaware of that knowledge and the knowledge actually prejudiced the defendant by preventing the juror from rendering a fair and impartial verdict. See United States v. Levy-Cordero, 67 F.3d 1002, 1017 (1st Cir. 1995) (requiring actual prejudice in motion

for new trial based on nondisclosure by juror); United States v. Aponte-Suarez, 905 F.2d 483, 492 (1st Cir. 1990) (same); United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983) (same). When a defendant is aware of the facts on which he bases a claim of juror bias, his failure to challenge the juror is a waiver of the claim. United States v. Costa, 890 F.2d 480, 482 (1st Cir. 1989).

A. Waiver

Desir claims to have been unaware that Sukys knew him because, at the time of empanelment, he did not recognize Sukys. Desir acknowledges having previously consulted with Sukys about various unspecified immigration matters, but attributes his inability to recognize Sukys to the fact that Sukys was wearing a suit and sporting a different haircut. Furthermore, Desir claims that he did not look closely at the jurors because his attorney had advised him that he had a mean-looking face and he should avoid giving the jurors the impression that he was staring at them.

That explanation is not credible in light of the fact that, during the empanelment process, Sukys identified himself by name, and stated that he worked at the International Institute. Moreover, attorney Cicilline and Desir specifically discussed the desirability of having Sukys as a juror. Cicilline recommended that Sukys be left on the jury because his background at the International Institute suggested that he would be sympathetic to non-citizens and that he was aware of the immigration consequences

if Desir were convicted. Desir concurred with that recommendation.

Any doubt that Desir knew who Sukys was is dispelled by the fact that his sisters, Michaelle Larracuente and Nadine Desir, told him. Michaelle was present at the time of empanelment and immediately recognized Sukys from her frequent contact with him at the International Institute. During the trial, which both sisters attended, Michaelle told Nadine about Sukys. While the trial was in progress, Michaelle and Nadine regularly visited Desir, and, although Michaelle denied it, Nadine acknowledged that Sukys' presence on the jury was mentioned to Desir during one of those visits.

In short, I find that, at the time of empanelment and trial, Desir knew who Sukys was and chose not to challenge Sukys because he believed that Sukys would be favorably inclined toward him. Consequently, Desir has waived any claim that he is entitled to a new trial because Sukys knew him. Costa, 890 F.2d at 482 ("[a]ny other rule would allow defendants to sandbag the court by remaining silent and gambling on a favorable verdict, knowing that if the verdict went against them, they could always obtain a new trial by later raising the issue of juror misconduct.")

B. Knowledge of Prior Conviction

There is no credible evidence supporting the allegation that Sukys knew that Desir had a previous conviction for a drug offense.

Desir argues, in effect, that such knowledge should be

inferred from his previous contact with Sukys and from Sukys' acknowledgment that information regarding any prior conviction probably would have been contained in Desir's file to which Sukys would have had access. However, there is no confirmation that the file, in fact, contained such information. Nor is there any evidence that Sukys actually looked at Desir's file. Finally, and most importantly, Sukys testified that even if he once had known of Desir's prior conviction, he had no memory of it at the time of trial. Indeed, at first, Sukys did not even recognize Desir or remember who he was because Sukys had not seen Desir for approximately two years and had helped hundreds of individuals with immigration problems since that time.

Sukys did acknowledge that, shortly after empanelment, Desir's sisters visited him at the International Institute. Their ostensible purpose was to learn what effect a possible conviction would have on Desir's immigration status, but it is more likely that their purpose was to influence Sukys. Sukys told the sisters that he was not allowed to discuss the case and that they should consult Desir's attorney. Sukys did admit telling the sisters that convictions have immigration consequences, but he denied any discussion regarding Desir's prior convictions. Even Desir's sisters did not claim to have had any discussion with Sukys about prior convictions until long after Desir was convicted. In fact, the sisters denied that the meeting described by Sukys occurred.

The only evidence that Sukys knew of Desir's prior conviction consisted of testimony from Desir's sisters regarding a conversation that they allegedly had with Sukys in December of 1998, eleven months after Desir's conviction. According to the sisters, Sukys told them that, because he knew of Desir's prior conviction, he made up his mind that Desir was guilty before any evidence was presented. If true, such flagrant misconduct by a juror, clearly, would warrant a new trial. However, the Court rejects that testimony for several reasons.

First, it is difficult to believe that Sukys would have harbored such negative feelings toward Desir. Sukys had enjoyed a cordial relationship with Desir and his family and had worked diligently to help them, in general, and Michaelle Larracuente, in particular, with various immigration matters.

Furthermore, Sukys saw Michaelle in the courtroom at the time of empanelment and, later, learned that she was Desir's sister, a fact which he foolishly and inexcusably failed to report to the Court. Thus, even if he had prejudged Desir, it is unlikely that he would have chosen to remain on the jury for the purpose of convicting someone with whose family he had frequent contact and a good relationship.

In addition, it is highly unlikely that Sukys would volunteer that he committed a gross breach of his sworn duty as a juror, and it is even more unlikely that he would make such a confession to

Desir's sisters.

Finally, it is doubtful that Desir would have waited for seven months after his sisters told him of Sukys' alleged admission before filing his new trial motion.

To summarize, Desir has failed to demonstrate that Sukys' conduct deprived him of a fair trial. He has presented no credible evidence to support his claims that Sukys knew of his prior conviction or that Sukys was predisposed to find him guilty.

Certainly there are grounds for criticizing Sukys' conduct as a juror. As soon as he realized that he knew Desir and members of Desir's family, he should have reported it to the Court. Moreover, he should have refrained from any conversation whatever with Desir's sisters while the trial was in progress. However, Sukys' indiscretions do not rise to the level of misconduct that would warrant a new trial.

II. Empanelment by a Magistrate Judge

The U.S. Supreme Court has held that it is permissible for a magistrate judge to empanel a jury in a felony case unless the defendant objects. Peretz v. United States, 501 U.S. 923, 936 (1991). Peretz expressly refrained from deciding whether a felony defendant "has a constitutional right to demand the presence of an Article III judge at voir dire." Id. The Court did not reach that question because it determined that "a defendant has no constitutional right to have an Article III judge preside at jury

selection if the defendant has raised no objection to the judge's absence." Id.

The defendant's affirmative consent is not required for empanelment by a magistrate judge. See U.S. v. Martinez-Torres, 944 F.2d 51, 51-52 (1st Cir. 1991) (en banc). Rather, it is incumbent upon the defendant to object and a failure to object bars the defendant from later challenging the empanelment on that ground.[1] Peretz, 501 U.S. at 937 ("[the Constitution] provides no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury"); Martinez-Torres, 944 F.2d at 52.

In this respect, a defendant's "right" to object to empanelment by a magistrate judge is similar to any other "right" to object that the defendant may have which is lost if not asserted. For example, although a defendant may have a "right" to object to the admission of evidence, perhaps even on constitutional grounds, counsel may choose, for sound tactical reasons, not to object. Unless the failure to object rises to the level of ineffective assistance, it is binding upon the defendant and precludes any subsequent claim that the evidence was improperly received. New York v. Hill, 120 S.Ct. 659, 664 (2000) (holding

[1] Of course, it would be preferable to specifically ask the defendant whether he objects to empanelment by a magistrate judge, thereby eliminating any question as to whether the failure to object resulted from ignorance of the relevant facts. That is the practice that, now, has been adopted in this district.

that, absent ineffectiveness of counsel, counsel's tactical decisions at trial bind defendant); U.S. v. Parilla-Lopez, 841 F.2d 16, 20 (1st Cir. 1988).

Of course, a failure to object makes empanelment by a magistrate judge permissible only if the defendant or his counsel is chargeable with knowledge that it is a magistrate judge who is conducting the empanelment. Here, Desir claims that he, personally, was unaware that there was a difference between magistrate judges and district judges; that Magistrate Judge Lovegreen was a magistrate judge; and that he could have objected to empanelment by a magistrate judge. Desir further claims that, had he known these things, he would have objected because Magistrate Judge Lovegreen appeared to be impatient during the empanelment process and because Desir's attorney told him that Magistrate Judge Lovegreen would not ask some of the questions that Desir wanted to pose to prospective jurors.

Although Desir might not have known the precise differences between a magistrate judge and a district judge, it is difficult to believe that he was unaware that some distinction existed. The fact that he appealed Magistrate Judge Lovegreen's detention order to this Court suggests that he was aware that there was a distinction.

It is even more difficult to believe Desir's other assertions. There is nothing in the record supporting the claim that Magistrate

Judge Lovegreen exhibited any impatience or refused to ask any questions that Desir requested. Desir does not even say what those questions were. Moreover, Desir never objected to the manner in which the empanelment was conducted or raised the issue on appeal.

In any event, even assuming that Desir, personally, did not know that he could have objected to empanelment by Magistrate Judge Lovegreen, his attorney did know and chose not to object. Nor is there any indication that counsel was deficient in making that decision. Desir does not even make such a claim. Indeed, there are many sound tactical reasons why an attorney might prefer empanelment by a magistrate judge. This case provides an apt example because the transcript of the empanelment reveals that Magistrate Judge Lovegreen was more liberal than this Court in allowing counsel to participate in the questioning of prospective jurors.

Accordingly, Desir is bound by his counsel's decision and failure to object.

Conclusion

For all of the foregoing reasons, Desir's motion for a new trial is denied.

IT IS SO ORDERED,

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Ernest C. Torres
Chief Judge
Date: October , 2000